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IN THE

Supreme Court of the United States

TRI-COUNTY CONCERNED CITIZENS ASSOCIATION, PATTY BRANN, KATHY BRILL, WILLIAM CRANSTON, HOLLY HARTSHORNE, BARBARA MESSNER,

Petitioners,

v.

RAYMOND CARR, MORGANTOWN PROPERTIES, INC., WILLIAM BETZ, JUDITH BETZ, ROBERT G. WILLIAMS, CAROLYN WILLIAMS, CHERYL CONKEL AND NEW MORGAN BOROUGH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS RAYMOND CARR AND MORGANTOWN PROPERTIES, INC.

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QUESTIONS PRESENTED

The court of appeals affirmed the dismissal of petitioners' substantive and procedural due process claims and RICO claim on the grounds that petitioners did not possess a constitutionally recognized property interest subject to due process guarantees and had failed to allege any proximately caused RICO injury resulting from the actions of the respondents. The questions presented are:

1. Whether under the Fourteenth Amendment petitioners have a constitutionally recognized property right to be "free" from nuisance injuries and diminutions in property values allegedly resulting from land uses allowed in a neighboring municipality.

2. Whether petitioners' RICO claim was properly dismissed by the Third Circuit under the standards established by this Court in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992).

3. Whether the refusal of the court of appeals to disturb the district court's disallowance of a third amended complaint presents any issue worthy of review.

RULE 29.6 STATEMENT

Respondent Morgantown Properties, Inc. (*sic*)* has no parent, and there are no publicly held companies involved in its ownership.

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* Petitioners misidentify Morgantown Properties as a corporation. The company is a privately held Pennsylvania limited partnership, and not an incorporated entity.

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OPINIONS BELOW

The opinion of the panel (Sloviter, Roth and McKee, JJ.) of the court of appeals is not published and is a non-precedential decision of that court. (App. 1-4). Petitioners did not seek reconsideration of the decision from the panel, nor did they apply for reargument *en banc* before the court of appeals.

The memorandum opinions of the district court are unreported. (App. 5-34; 49-63).

STATEMENT OF JURISDICTION

Petitioners seek to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1) to review the September 26, 2002 final judgment of the United States Court of Appeals for the Third Circuit. There is serious doubt whether they have timely and properly done so.

Petitioners were required by 28 U.S.C. § 2101(c) and Supreme Court Rules 12, 13 and 33.1 to petition for a writ of certiorari within ninety (90) days of entry of the final judgment of the court of appeals. Petitioners did not seek or obtain an extension of time for petitioning.

On December 26, 2002, the last permissible day for filing, petitioners mailed to the Court ten (10) unbound photocopies of a proposed petition. On Friday, December 27, 2002, petitioners submitted by mail forty (40) bound, booklet format

copies of a petition for a writ of certiorari[1] Because neither of these submissions satisfied the requirements of the Rules and 28 U.S.C. § 2101(c), petitioners' application for certiorari appears to be improper and out of time. Should the Court confirm the filing to be improper, the writ should be denied. *See Department of Banking v. Pink*, 317 U.S. 264, 268 (1942) (an untimely petition for a writ of certiorari in a civil case must "be denied for want of jurisdiction").

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The due process clause of the Fourteenth Amendment provides, in relevant part, as follows:

> No State shall...deprive any person of life, liberty, or property, without due process of law ...

U.S. CONST. amend. XIV, §1.

Section 1962(c) of the Racketeer Influenced and Corrupt Organizations ("RICO') Act provides as follows:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign

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[1] Respondents cannot determine when petitioners remitted the requisite filing fee for the petitions as each of the transmittal letters accompanying the separate filings made on December 26, 2002 and December 27, 2002 state that the filing fee was enclosed. *See* December 26, 2002 and December 27, 2002 letters to the Office of the Clerk from Carl W. Ewald, Esquire.

> commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c).

Section 1964(c) of the RICO Act provides, in relevant part, as follows:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damage he sustains and the cost of suit, including a reasonable attorneys' fee...

18 U.S.C. § 1964(c).

Section 1983 of the Civil Rights Act provides, in relevant part, as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory...subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

42 U.S.C. § 1983.

STATEMENT OF THE CASE

Petitioners seek review of the unanimous panel decision of the court of appeals which affirmed, essentially on the basis of the opinion of the district court, the dismissal of their §1983 substantive and procedural due process claims and single RICO claim on the grounds that (i) petitioners had failed to identify a protected property interest subject to substantive due process protection under the Fourteenth Amendment to the United States Constitution, (ii) failed to state a claim for a violation of procedural due process because they lacked any protected property interest and had failed to pursue the adequate process available in Pennsylvania to challenge the complained-of actions of the respondents, and (iii) failed to establish the requisite causal connection between their alleged injuries and the actions of the respondents for purposes of their civil RICO claim.

In their amended complaint petitioners alleged that zoning regulations adopted by New Morgan authorized a number of "noxious" land uses within the Borough in violation of their civil rights and Section 1962 of the RICO statute. Because petitioners do not reside, own or occupy land in the Borough, and their properties are not subject to New Morgan's regulations, petitioners did not and could not claim injury from any exaction or occupation by the Borough, nor from any zoning prohibition, land use denial, development denial, building permit denial, or other land use refusal imposed on them by the Borough. Instead, petitioners asserted to the district court and the court of appeals that they had suffered constitutional and statutory damages in the form of the "loss" of the

"use and enjoyment" and a "devaluation" in the worth of their properties as a consequence of the operation of an existing landfill and other (proposed) land uses allowed by zoning within New Morgan, and that such injuries were redressable under the Civil Rights Act and the civil remedy provisions of the RICO statute.

1. Petitioners commenced this action against New Morgan Borough, its officials and private parties Raymond Carr and Morgantown Properties on August 10, 1998. Motions to dismiss the original complaint were filed by all of the respondents. On November 20, 1998, the district court granted respondents' motions and dismissed the complaint on the ground that petitioners lacked Article III and statutory standing to assert their § 1983 and RICO claims. In the absence of any federal anchor claims, petitioners' supplemental state law claims were dismissed pursuant to 28 U.S.C. § 1367(c)(3). (App. 26-34).

2. On December 7, 1998, petitioners moved for reconsideration, in part, of the dismissal order, and sought leave to file an amended complaint. Petitioners did not seek reconsideration of the portion of the district court's order that dismissed a Fifth Amendment takings claim that had been asserted in the original complaint (Count V), and that claim was abandoned and never reasserted by petitioners in the amendments to the original complaint that followed. The motion for reconsideration and leave to file the amended complaint was denied by the district court in an order issued without opinion on February 24, 1999. Petitioners appealed the district court orders to the court of appeals which re-

versed the dismissal of the complaint, in an unreported opinion, solely on jurisdictional standing grounds. (App. 35-44).

3. Following remand and the filing by petitioners of their amended complaint, respondents jointly moved to dismiss on February 23, 2001. On September 18, 2001, the district court granted respondents' motion and dismissed the amended complaint. (App. 5-19). Prior to the entry of the September 18, 2001 dismissal order, on December 11, 2000, the district court denied an intervening motion brought by the petitioners to submit a third amended (fourth overall) complaint. (App. 49-59). The December 11, 2000 order denying leave to further amend and the September 18, 2001 dismissal order were subsequently affirmed by the court of appeals in the September 26, 2002 judgment that is the subject of the instant petition.

4. In their brief to the court of appeals, petitioners presented the following issues for review:

(a) Whether the district court erred in concluding that plaintiffs did not have any property interest in the use, enjoyment or value of their land that is protected by the constitutional guarantee of substantive due process.

(b) Whether the district court erred in concluding that plaintiffs failed to state a due process claim under the Fourteenth Amendment due to the availability of Pennsylvania state law remedies to redress the alleged deprivation of plaintiffs' property interests.

(c) Whether the district court erred in concluding that the complaint does not adequately plead an injury proximately caused by defendants' alleged violations of the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964(c).

(d) Whether the district court erred in denying leave to amend.

See Brief of Appellants, pp. 1-2 (December 27, 2001); App. 2-3 (summary of issues presented on appeal).

5. In contrast to the issues presented on appeal to the court of appeals, the questions presented by petitioners in their petition for a writ of certiorari to this Court state the questions presented as follows:

(a) Is a local government subdivision exempt from liability for takings without substantive due process because those takings are effectuated against properties in neighboring local government subdivisions?

(b) May a plaintiff *(sic)* bring a RICO suit where the plaintiffs' injuries were proximately caused by the defendants' illegal acts if the injuries were not the immediate result of the defendants' act but, rather, a result of the end?

(c) Should leave to amend be granted where the proposed Amended Complaint would add

necessary, relevant facts at the pretrial stage in a complex case?

REASONS FOR DENYING THE WRIT[2]

Petitioners' application for a writ of certiorari should be denied for four compelling reasons. First, petitioners are seeking impermissibly to argue a "takings claim" before this Court, even though such issue was not raised or addressed by the court of appeals. Second, the court of appeals' dismissal of petitioners' substantive and procedural due process claims on the grounds they lacked a constitutionally-recognized property interest protected under the Fourteenth Amendment, and had failed to avail themselves of the adequate process which exists in Pennsylvania to challenge the zoning and land use decisions of the Borough, was undoubtedly correct and not in conflict with any decision of this Court or another court of appeals. Third, the holding of the court of appeals that petitioners' RICO claim had to be dismissed for failure of proximate causation is completely correct and consistent with this Court's RICO jurisprudence and the decisions of other courts of appeals. Lastly, the denial of leave to petitioners to further amend their complaint does not present any issue worthy of review by this Court.

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[2] Respondents incorporate by reference the arguments set forth in the Brief in Opposition filed by co-respondents William Betz, Judith Betz, Robert G. Williams, Carolyn Williams and New Morgan Borough.

A. Petitioners Are Attempting To Argue A Claim Not Previously Raised Before The Court Of Appeals

Petitioners assert that they have suffered a "taking" of their property, and argue that the court of appeals has erroneously "moved" the law of takings "in the opposite direction" of this Court's holdings in *Penn Central Transportation Company v. New York City*, 438 U.S. 104 (1978); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). (Pet. 14-17).

No "takings claim" was presented to the court of appeals, however, and that court consequently did not reach, address or decide any "takings" issues in its determination.[3] (App. 2-4). Because questions not raised below are virtually never decided by this Court in the first instance on appeal, *see Carlson v. Green*, 446 U.S. 14, 17 n. 2 (1980)(the court will not "normally decide issues not presented below"), the fact that petitioners did not assert, brief, or otherwise raise any "takings claim" before the court of appeals should preclude the issue from being raised for the first time in this Court.

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[3] Petitioners did not cite the *Lucas*, *Nollan*, and *Penn Central* cases in their brief to court of appeals, nor did they make any "takings" arguments or cite to *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) or the Ninth Circuit's decision in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 216 F.3d 764 (9th Cir. 2000), which was subsequently affirmed by this Court at 535 U.S. 302 (2002).

Two other reasons exist to deny consideration of petitioners' takings claim.

First, petitioners voluntarily abandoned this claim in the early stages of this litigation.

Second, this Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 186-94 (1985) bars federal court consideration of the claim at this time as it requires a property owner alleging a takings claim to first seek just compensation under state law where available procedures exist to do so before the claim may be pursued in federal court.

It is indisputable that Pennsylvania provides the full range of remedies and procedures for claims of *de jure*, *de facto* or inverse condemnations. *See* Section 502(e) of the Pennsylvania Eminent Domain Code, 26 P.S. § 1-502(e) (Purdon 1997). *See also Meyers v. Penn Township Board of Commissioners*, 50 F.Supp. 2d 385, 392 (N.D. Pa. 1999) (Pennsylvania has in place adequate state law procedures to obtain compensation in takings cases). It is also undisputed and indisputable that petitioners did *not* commence any proceedings or otherwise avail themselves of the procedures available to them under Section 502(e) of the Pennsylvania Eminent Domain Code to secure just compensation. Accordingly, petitioners' "takings claim" cannot be pursued at this time for this additional reason.

B. Because Petitioners Have Not Asserted And Do Not Possess A Constitutionally-Recognized Property Interest Protected Under The Fourteenth Amendment, Their Substantive And Procedural Due Process Claims Fail As A Matter of Law.

The only constitutional claims actually asserted by the petitioners and addressed by the courts below were their claims that their substantive and procedural due process rights were violated by the zoning adoptions of New Morgan Borough. As alleged in the amended complaint, petitioners claimed that the Borough's zoning authorizations for a landfill and other uses imposed "a wide range of adverse effects" on the petitioners' properties, including "noxious odors, loud and disruptive noises, trash hanging from trees on local roads, damaged streets, and broken windshields and other property." Am. Compl. ¶¶ 1, 3, 18, 19, Rec. Doc. 13.

These "adverse effects" are alleged to have "unreasonably infringe[d]" upon petitioners' properties in "violation" of their "constitutional right[s] to be free from nuisance" and "to own, use and enjoy their land free from significant private and public nuisances imposed under color of law." *Id.* at ¶¶3, 35.

The determinative legal issue implicated in these claims is whether petitioners possess the particular kind and quality of property interest that is encompassed by the protections of the Fourteenth Amendment. *DeBlasio v. Zoning Board of Adjustment*, 53 F.3d 592, 600 (3d Cir. 1995); *Acierno v. Cloutier*, 40 F.3d 587, 616 (3d Cir. 1994).

As stated by Justice Powell in his concurring opinion in *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985);

> Even if one assumes the existence of a property right...not every such right is entitled to the protection of substantive due process...The history of substantive due process counsels caution and restraint...[and the] determination that a substantive due process right exists is a judgment that require[s] particularly careful scrutiny...Each new claim to substantive due process protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed.

474 U.S. at 229-30 (internal quotations and bracketing omitted).

Whether an asserted property interest embodies the kind of "particular quality" that is "protected by the concept of substantive due process"...depends on whether that interest is 'fundamental' under the United States Constitution." *Nicholas v. Pennsylvania State University*, 27 F.3d 133, 140 (3d Cir. 2000)(citations and other internal quotations omitted).

As part of its careful analysis, the district court evaluated every permutation of petitioners' assertions and concluded, on the basis of the foregoing precepts and numerous federal court decisions, that petitioners did not possess the type of constitutionally-protected property interests that are encom-

passed by the due process guarantees of the Fourteenth Amendment. (App. at 9-12). The trial court reached this determination after canvassing a wide range of federal court decisions that rejected substantive due process claims similar or virtually identical to those asserted by petitioners in this case. *See, e.g., MacNamara v. County Council of Sussex County*, 738 F.Supp. 134, 141 (D. Del. 1993) ("Although land ownership might initially appear to present a straightforward example of a protected property interest, it is far from clear that every impact on land ownership caused by zoning regulations creates a right to process."), *aff'd w/o op.*, 922 F.2d 832 (3d Cir. 1990); *Stop-Save Township Open Places, Inc. v. Board of Supervisors*, No. 96-7325, 1996 U.S. Dist. LEXIS 16998, at * 13-16 (E.D. Pa. November 15, 1996)(finding no protected property interest against declines in values resulting from use of neighboring property and holding that there is "no fundamental right in modern society to be free from increased traffic, noise or an incursion on open space [as] [i]ncreased residential and commercial development is an inevitable fact of life in expanding suburban areas.").[4]

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[4] Beyond the *MacNamara* and *Stop-Save Township* decisions, both of which rejected substantive due process claims based on allegations of diminutions in property values resulting from a third party's use of adjoining property, numerous other decisions considered by the district court rejected claims similar to the substantive due process claims put forth by petitioners in this case. *See, e.g., Woodward and Lothrop, Inc. v. Neall*, 813 F.Supp. 1158, 1160 (D. MD. 1993)(no protected property interest in use of another's land that may reduce market value of plaintiff's property); *Mehta v. Surles*, 905 F.2d 595, 598 (2d Cir. 1990)("a

In the face of this overwhelming authority, and on the basis of the well-reasoned analysis undertaken by the district court, the court of appeals, essentially on the basis of the reasoning of the trial court, affirmed in all respects the dismissal of petitioners' substantive due process claim.

Significantly, petitioners do not address any of the above-cited cases in their petition, nor do they even acknowledge the controlling legal issue implicated in their claims, i.e., whether they suffered a deprivation of a constitutionally-recognized property interest protected under the Fourteenth Amendment. Instead, petitioners incredulously assert that the district court and the court of appeals "avoided" and "duck[ed] the central issues in this case." Pet. 14. In truth, it is the petitioners that have ignored the issues and avoided

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person cannot claim a constitutionally-protected property interest in the uses of neighboring property on the grounds those uses may affect the market value of his own property."); *Fusco v. The State of Connecticut*, 815 F.2d 201, 205-06 (2d Cir. 1987)(holding that plaintiffs' claims of diminished property values from other developments did not implicate property interests protected by the Fourteenth Amendment) *cert. denied*, 484 U.S. 849 (1987); *BAM Historic District Association v. Koch*, 723 F.2d 233, 237 (2d Cir. 1993)(plaintiffs' claims of a decline in property values caused by a city's operation of a homeless shelter failed to state a due process claim for deprivation of a protected property interest); *Anderson v. Collins*, No.2:96-C.V. 269, 1998 U.S. Dist. LEXIS 11421, *20 (E.D. KY., July 14, 1998)("a person does not have a protected property interest in the use of another's land, even though the use adversely affects property values, and government action that causes a decline in property values is not a 'deprivation' that comes under constitutional protection."), *aff'd w/o pub. op.*, 191 F.3d 451 (6th Cir. 1999).

any discussion of the actual holdings and rationale of the lower courts.

The district court correctly determined that there "is no fundamental right in modern society to be free from increased traffic," "odors, noise, pollution or dirt," and other "inevitable" effects of development and "life in expanding suburban areas." (App. 11) (quoting *Stop-Save Township*, 1996 U.S. Dist. LEXIS 16998 at *13).

The district court also correctly perceived the true nature of petitioners' claims, and recognized that while their claims might be appropriate in state court, they did not belong in federal court. As expressed by the trial court, although it was "understandable" that petitioners were "not pleased with the effects of a landfill...rural areas are also becoming subject to change...[and while] *nuisances which may result from these changes in land use may be actionable under state nuisance law...they do not constitute violations of substantive due process.*" (App. 11-12) (emphasis added).

Petitioners do not argue against the district court's conclusion in this regard, and it would be folly for them to attempt to do so.

As this Court has made clear, although the Fourteenth Amendment operates as a limitation on a state's power to act, it does *not* impose affirmative obligations on the state to guarantee minimal levels of safety and security or ensure that an individual's property does not come to harm through other means. *Collins v. City of Harker Heights*, 503 U.S. 115, 127 (1992). Moreover, the Amendment does not exist

for the purpose of enabling land owners to exclude unwelcome but otherwise lawful land uses, be they landfill or factory, prison or race track, from their environs.[5] *See BAM Historic District Association v. Koch*, 723 F.2d at 237 (land owners who objected to city opening a homeless shelter in their neighborhood did not state a due process claim for deprivation of a protected property interest).

The absence of merit in petitioners' due process claims is also revealed by their failure to discuss the lower courts' dismissal of their procedural due process claim. This is understandable as it is beyond argument that petitioners are unable to bring a procedural due process claim in this case because, as both the trial court and the court of appeals determined, plaintiffs have not been deprived of a protected property interest and failed, in any event, to pursue the avail-

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[5] The land uses complained of by petitioners (i.e., the landfill, trash incinerator, prison, race track, and treatment plant) are all legal and lawful uses under Pennsylvania law that cannot be excluded from a municipality through zoning. *See e.g., Moyers Landfill, Inc. v. Zoning Hearing Board of Lower Providence Twp.*, 450 A.2d 273 (Pa. Commw. Ct. 1983) (landfills); *Warren County Probation Ass'n v. Warren County Zoning Hearing Board*, 414 A.2d 398 (Pa. Commw. Ct. 1980) (detention facility); *Bedminster Township v. Vargo Dragway, Inc.*, 253 A.2d 659 (Pa. 1969) (race track); *General Battery Corp. v. Alsace Township Zoning Hearing Board*, 371 A.2d 1030 (Pa. Commw. Ct. 1997) (solid waste disposal facilities); *Ward v. Hampton Township*, 271 A.2d 895 (Pa. Commw. Ct. 1979) (treatment plant); *Kohr v. Weber*, 166 A.2d 871 (Pa. 1960) (dragstrip); *Roberts v. Lower Merion Township*, 5 A.2d 106 (Pa. 1939) (trash incinerator). *See also, Surrick v. Zoning Hearing Board of Upper Providence Township*, 382 A.2d 105 (Pa. 1977) (municipalities must make provision for all lawful land uses within their borders).

able procedures under Pennsylvania law for challenging the zoning and land use decisions of New Morgan Borough. (App. 3, 13). *See Rogin v. Bensalem Township*, 616 F.2d 680, 694-95 (3d Cir. 1980) (upholding Pennsylvania's statutory scheme for challenging zoning and land use decisions of local municipalities), *cert. denied*, 450 U.S. 1029 (1981); *Taylor Investments, Ltd. v. Upper Darby Township*, 983 F.2d 1285, 1294-95 (3d Cir. 1993) (declaring Pennsylvania's scheme for challenging zoning ordinance to be consistent with due process); *Midnight Sessions Ltd. v. City of Philadelphia*, 945 F.2d 667, 680-81 (3d Cir. 1991) (same), *cert. denied*, 503 U.S. 984 (1992).

Given the absence of any constitutionally-protected property rights in this case, it is clear that the decisions of the district court and the court of appeals were proper and correct. Because these decisions are also consistent with, and do not depart from, the holdings of this Court and other courts of appeals, there is no legitimate basis upon which certiorari could or should be granted on this issue.

C. The Third Circuit Properly Dismissed Petitioners' RICO Claim For Lack Of Proximate Causation

Petitioners erroneously assert that the court of appeals dismissed their RICO claim on the ground that petitioners had to establish that their injuries were "directly caused" by the alleged RICO violation.

As even a cursory review of the opinion reveals, the court of appeals did not hold that the petitioners were required to establish direct causation for their injuries.

What the court of appeals in fact held was that petitioners were required by Section 1962 of the RICO statute to establish that their alleged injuries were *"proximately caused"* by the alleged racketeering violations of the respondents, and had failed to do so. This holding is completely consistent with the decisions of this Court and the other circuit courts of appeals, and there is no split in authority on this issue. (App. 4.)

Furthermore, it is also clear from reviewing the opinion that the court of appeals properly focused its analysis on the allegations brought by the petitioners and the factors the district court considered in concluding that the allegations failed to establish that respondent's actions "proximately caused the alleged injury to [petitioners'] property." *(Id.)* In so doing, the court of appeals fully considered and joined in the reasoning and analysis employed by the district court.

That the appropriate standard was applied in this case is also clear from the analysis engaged in by the district court which examined carefully the legal elements required for the claim, and the controlling decisions of this Court establishing the standards by which such claims are to be measured. (App. 14-15).

In its determination, the district court correctly applied the proximate causation standards established by this Court in

Holmes v. Securities Investor Protection Corp., 503 U.S. 258 (1992) for evaluating RICO claims.

Guided by *Holmes* as well as decisions of the court of appeals, the district court undertook a detailed analysis of the three factors needed to be analyzed to determine whether proximate causation exists in the RICO context. These factors relate to:

> (1) the directness of the injury—the more indirect the injury, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to a defendant's wrongdoing, as distinct from other, independent, factors; (2) the difficulty of apportioning damages among potential plaintiffs—allowing recovery by indirectly injured parties would require complicated rules for apportioning damages; and, (3) the possibility of other plaintiffs vindicating the goals of RICO—direct victims could generally be counted on to vindicate the policies underlying RICO in a better manner than indirect victims.

Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912, 932 (3d Cir. 1999), *cert. denied*, 528 U.S. 1105 (2000) (quoting *Holmes*, 503 U.S. at 268-69) (internal quotations omitted). *See also, Allegheny General Hospital v. Philip Morris, Inc.*, 228 F.3d 429, 443 (3d Cir. 2000) (upholding a dismissal of RICO claims based on a lack of proximate causation under the three factors test).

Carefully applying these factors to the facts alleged by the petitioners, the district court, and subsequently the court of appeals, determined that the injuries alleged to have been suffered by the petitioners were not proximately caused by the actions of the respondents.

As stated by the district court, based on the allegations of the amended complaint, it was clear that the injuries complained of by the petitioners resulted from the *operation* of "noxious businesses," *not* the alleged zoning extortion of the respondents. (App. 17). As the district court further observed, the "inherent indirectness" of petitioners chain of causation strongly counseled against allowing the claim to proceed as it would "create problems for a factfinder who would be required to determine the extent to which [respondents] alleged RICO violations affected [petitioners'] property as opposed to other factors." (App. 17). Further complicating these issues, the district court also recognized that the factfinder would also have to attempt to determine whether the zoning in the Borough "would have been the same absent" the alleged RICO violations, and that any assessment of damages with respect to the petitioners' properties would have to involve "extremely difficult and impractical" considerations of market forces, supply and demand, and standard depreciation. (App. 17). The district court also analyzed the difficulties the factfinder would face in attempting to apportion damages among the multiple petitioners, and concluded that this factor would be "as impractical as ascertaining damages traceable to" the respondents' alleged conduct. These apportionment issues would include, but not be limited to, the "identification and valuation of

other sources of positive and negative effects" on petitioners' properties, the "establishment of ownership identification and property histories," and the development of complicated rules for undertaking before and after valuations of properties extending back over many years. (App. 17-18).

Based on these factors, the district court and the court of appeals properly concluded that the inherent indirectness of petitioners' injuries, the difficulties that would be confronted in attempting to ascertain and apportion damages among the various petitioners, the complexity of determining whether other forces lowered the value of petitioners' properties, and the impracticality of attempting to assess and calculate the individual quantum of damage applicable to each petitioner compelled the conclusion that petitioners' claims of injury were not proximately caused by the actions of the respondents for purposes of § 1962.

In affirming the district court, the third circuit did not break any new ground, and its decision conforms exactly to the precedents of this Court and the other courts of appeals.

In an attempt to buttress their argument, petitioners claim that the decision of the court of appeals is in direct conflict with the decision of the Fourth Circuit in *Mid-Atlantic Telecom, Inc. v. Long Distance Services, Inc.*, 18 F.3d 260 (4th Cir. 1994), which petitioners assert "expressly allowed" a RICO suit for derivative damages. In fact, the *Mid-Atlantic* decision did *not* allow an action for derivative damages, and carefully evaluated the claims brought in that case to ensure that the injuries the plaintiff was claiming were *not* derivative of losses suffered by third parties, but were distinct and

independent injuries proximately caused by the racketeering conduct engaged in by the defendants. Significantly, the *Mid-Atlantic* court engaged in the same type of proximate causation analysis as the district court in this case, and directly based, as did the district court here, its decision on the causal requirements for RICO injuries as set out in *Holmes*.

Because the decisions below are not in conflict with any decision of this Court or any court of appeals, there is simply no basis upon which review in this Court is justified, necessary or warranted.

D. The Decision To Deny Leave To Amend Does Not Present Any Issue For Review

Petitioners assert that they should have been granted leave to further amend their complaint. In determining this issue, the court of appeals fully reviewed the district court's decision to deny leave (App. 49-59), and unanimously affirmed the judgment of the district court because the circumstances did not warrant or justify a grant of further leave to amend. (App. 4).

As set out in the district court's opinion, leave to file a third amended, and fourth overall, complaint was denied because petitioners had failed to comply with three orders of the court, had unduly delayed the preparation and filing of motions for leave to amend their pleading, and had prejudiced the respondents by prolonging the litigation unnecessarily.

In light of these circumstances the denial of leave was well within the discretion of the lower courts and, because this Court does not sit as a court of general error and appeal, there simply is no basis to involve the Court in this procedural aspect of the case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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